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No. 88-579

In The

Supreme Court of the United States

October Term, 1988

ONEIDA MOTOR FREIGHT, INC., a corporation organized under the laws of the State of New York,

Petitioner,

vs.

UNITED JERSEY BANK, a New Jersey Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant a petition for certiorari to review a decision of the United States Court of Appeals for the Third Circuit which affirmed the District Court's dismissal of a debtor's complaint against its secured lender on the express basis that the debtor violated both its statutory and fiduciary duty to disclose these claims during the pendency of the debtor's extended bankruptcy proceedings, applying principles of equitable and judicial estoppel against the debtor?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 28.1, respondent United Jersey Bank states that it is the wholly-owned subsidiary of United Jersey Banks and is affiliated with each of the following corporations:

First Valley Corporation
- First Valley Bank
  - Valbeth, Inc.
  - North-Val, Inc.
  - Lehigh Securities Corporation
  - First Valley Capital Corporation
  - Affiliated Financial Advisors, Inc.

First Valley Financial Services, Inc.
First Valley Life Insurance Company
First Valley Leasing, Inc.
The Hazleton National Bank
Hanover Bank of Pennsylvania
Valprop, Inc.
- FirstVal Properties, Inc.

West Side Bancorp, Inc.
- West Side Bank

Franklin Commercial Corporation of New Jersey
- CCF Technologies, Inc.

Franklin Safe Deposit Corporation
Rahway Avenue Urban Renewal Corporation
Richard Blackman & Co., Inc.
Trico Mortgage Company, Inc.
UJB Credit Corporation
- Gibraltar Corporation of America
- United Jersey Leasing Company
- United Jersey Mortgage Company
  - United Jersey Corporation
- Asset Management Corp.
  - J. & M. Realty Corporation

UJB Financial Corp.
- First Pipco, Inc.
- UJB Leasing Corporation
- United Jersey Hackensack Investment Corporation

United Jersey Bank/Central, N.A.
- FSB Investment Corporation
- Franklin State Armored Corporation
- United Jersey Princeton Investment Corporation

United Jersey Bank/Commercial Trust
- CTC Investment Co.
- S. A. R. Realty Holding Corporation

United Jersey Bank/Edgewater National
- ENB Investment Co.

United Jersey Bank/First Colonia
- Colonia Investment Co.

United Jersey Bank/Mid State
- United Jersey Mid State Investment Corporation

United Jersey Bank/Northwest
- United Jersey Northwest Investment Corporation

United Jersey Bank/South, N.A.
- Lenape Financial Services Corporation
- United Jersey South Investment Corporation

United Jersey Bank/Wood Ridge National
- WRNB Investment Co.

United Jersey Credit Life Insurance Company

United Jersey Insurance Agency, Inc.

United Jersey Venture Capital, Inc.

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vs.

UNITED JERSEY BANK, a New Jersey corporation,

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This action arises out of the lending and banking relationship between petitioner Oneida Motor Freight, Inc. ("Oneida") and respondent United Jersey Bank ("UJB"). From approximately

February, 1985 through July, 1985, Oneida's operating account at UJB became habitually overdrawn. On or about July 5, 1985, UJB ceased honoring checks drawn on uncollected or overdrawn funds in light of the rapid and extensive deterioration of Oneida's financial condition.

On July 10, 1985, Oneida filed a voluntary petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code. Thereafter, Oneida, under oath and penalties of perjury, filed its Schedules and Statement of Financial Affairs with the Bankruptcy Court. In Schedule A-2, Oneida *acknowledged* its debt to UJB in the amount of $7.7 million as undisputed, liquidated, non-contingent and without any claims of setoff. In its statement listing contingent and unliquidated claims of every nature, including counterclaims, Oneida did not include any potential claims against UJB.

Immediately upon the filing of the reorganization proceedings, Oneida discontinued its motor freight operations and commenced liquidating its assets; however, Oneida required the use of $1.5 million of UJB's cash collateral in order to finance its plan of liquidation.

On July 11, 1985, UJB filed an application for relief from the automatic stay, to enforce security interests, to appoint a trustee, and in the alternative for conversion or dismissal of the Chapter 11 case. This application further sought an order establishing the validity and extent of UJB's lien. UJB also filed an objection to Oneida's use of cash collateral pursuant to 11 U.S.C. § 363(e).

On July 12, 1985, the Bankruptcy Court, on short notice, held a hearing on Oneida's application for authority to use cash collateral and UJB's objection to that application. On July 25, 1985, after having taken oral testimony, the Bankruptcy Court

entered an order *consented to by Oneida* authorizing Oneida's use of up to $1.5 million of UJB's cash collateral and providing adequate protection for UJB. The order specifically provided that Oneida's pre-petition loan agreement and security agreement with UJB were affirmed, ratified and adopted by Oneida (Respondent UJB's Appendix 2a, hereinafter "Resp. App.").

On September 19, 1985, the Bankruptcy Court entered a consent order modifying the cash collateral order of July 25, 1985 with the agreement of Oneida, Oneida's official unsecured creditor's committee (the "Creditors Committee") and UJB (Resp. App. 11a). This order modified the procedure for post-petition borrowing and specifically affirmed all other provisions of the July 25, 1985 order. On September 30, 1985, the court entered a stipulation and order confirming the settlement among UJB, Oneida, and the Creditors Committee (Resp. App. 14a). The September 30, 1985 order, which was also based upon the consent of Oneida, the Creditors Committee and UJB, became the foundation for Oneida's Plan of Reorganization in which UJB consented to treatment as an impaired creditor only with respect to reimbursement of all interest, costs, legal fees and recovery for any liability as issuer on outstanding letters of credit. That order also provided for the *unconditional* payment by Oneida to UJB of the sum of $6,650,000 which was thereafter paid (Resp. App. 16a).

On January 14, 1986, the Bankruptcy Court entered an order and judgment establishing the extent, validity and priority of UJB's lien (Resp. App. 18a). The order and judgment provided that there was due and owing by Oneida to UJB as of the filing of Oneida's bankruptcy petition the sum of $7,631,322.73 consisting of $5,891,897.74 principal, $107,174.99 interest to July 9, 1985 and letters of credit of $1,632,250.00, to the extent paid, together with accruing interest and allowed counsel fees on the aggregate indebtedness. The order provided that it was without prejudice

to Oneida's right to object to service fees charged by UJB, but did not reserve any other rights in favor of Oneida.

On March 3, 1986, the Bankruptcy Court entered an order supplementing the January 14, 1986 order (Resp. App. 20a). The order provided that the reservation of rights contained in the January 14, 1986 order would be terminated upon the payment by UJB to Oneida of the sum of $12,164.09 for service charges. In addition, the order provided that it constituted a final judgment for purposes of Rules 9021 and 8001 of the Rules of Bankruptcy Procedure. Pursuant to the terms of the order, the sum of $12,164.09 was thereafter paid to Oneida.

On August 14, 1986, the Bankruptcy Court entered an order confirming Oneida's Amended Joint Plan of Reorganization (Resp. App. 22a). Nowhere in Oneida's Plan of Reorganization or in the confirmation order is reference made to the claims alleged in the dismissed complaint against UJB. Based upon the stipulation and order entered on September 30, 1985, UJB did not oppose either separate classification and treatment, or confirmation of Oneida's Plan, and the Plan was substantially consummated. At no time prior to confirmation of its Plan did Oneida assert any challenge or counterclaim to UJB's filed proof of claim in the bankruptcy proceedings. Nearly seven months after the order of confirmation was entered, Oneida filed its complaint against UJB and obtained an order modifying its Plan *without notice to UJB.*[1]

This action was commenced by Oneida on March 11, 1987, in the Superior Court of New Jersey, Law Division, Bergen County, and alleges that UJB breached its loan agreement with Oneida, that it breached a course of dealing, that it breached its

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1. UJB's motion to vacate the order allowing the debtor to modify its Plan of Reorganization post-confirmation has been held in abeyance pending final determination of UJB's motion to dismiss Oneida's complaint.

duty of good faith, and that it made misrepresentations, which caused Oneida to file for bankruptcy. *None of these claims was raised by Oneida at any time during the pendency of its bankruptcy proceedings.* On July 6, 1987, the District Court (to which the complaint had been removed) dismissed Oneida's complaint against UJB. On May 31, 1988, the United States Court of Appeals for the Third Circuit affirmed. A petition for rehearing *en banc* was denied by the Third Circuit on July 1, 1988. On October 27, 1988, UJB moved in the Bankruptcy Court for an order to compel Oneida's compliance with the terms of its Plan as UJB has not yet received any distribution on its deficiency claim as is required under Oneida's confirmed Plan of Reorganization.

SUMMARY OF ARGUMENT

There is no reason for this Court to grant the petition for certiorari. The decision of the Third Circuit is entirely consistent with all other decisions from other circuits. There is no decision holding to the contrary. These courts have uniformly held that a debtor may not bring an action following confirmation of its reorganization proceedings when it does not disclose the existence of the claims during its bankruptcy case.

The decision of the Third Circuit is also consistent with the provisions and purposes of the Bankruptcy Code. A debtor is required to provide full and candid disclosure and has an absolute right to be heard during its bankruptcy proceedings. It would be completely contrary to the provisions and purposes of the Bankruptcy Code to allow a debtor to bring an action against a creditor following confirmation of its plan of reorganization when the debtor did not disclose the existence of the claims during the bankruptcy proceeding, in violation of its statutory and fiduciary duty to the court and its creditors.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI MUST BE DENIED AS THE THIRD CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS.

The Third Circuit's affirmance of the District Court's decision and order dismissing Oneida's complaint against UJB was based on well-settled principles of claim preclusion (equitable and judicial estoppel) and is completely consistent with prior holdings of this Court and other circuit and district courts. Oneida's claims to the contrary have no basis in law or in fact.

The Third Circuit's decision does not conflict with the decision of any other circuit, including the *single* Court of Appeals case cited by petitioner, *In re Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988). In that case, the debtor did not include in its disclosure statement any discussion of the *potential* equitable subordination of a creditor's claim. The Fifth Circuit in *dicta* found that this omission did not render the information in the disclosure statement inadequate because at no time prior to or after approval of the debtor's disclosure statement did the debtor or any other party pursue the claim for equitable subordination. *Id.* at 1157. As was noted by the *Texas Extrusion* court, there is no reason to provide information about an action which is "mere conjecture." *Id.*

That situation is in stark contrast to the present case where Oneida commenced a lender liability action against UJB *after*: (1) the debtor had obtained Bankruptcy Court approval of a disclosure statement which made *no mention* of the debtor's alleged claims against UJB; (2) the Bankruptcy Court entered four separate

orders confirming the extent, validity and priority of UJB's liens and approving the settlement among UJB, the Debtor and the Creditors Committee; and (3) UJB, Oneida and the Creditors Committee agreed to the separate classification and treatment of UJB's claim in Oneida's Plan of Reorganization which incorporated by reference the terms of the stipulation and order entered on September 30, 1985. The Third Circuit's decision is actually consistent with the *Texas Extrusion* case since that court noted that while there was no need to disclose information about speculative lawsuits which were not being pursued by any party, actual claims are properly included in the debtor's disclosure statement. *Id.* at 1157. Clearly, there is no irreconcilable conflict between the circuits on the issues raised by this case.

The Third Circuit's opinion is entirely consistent with the decision of this Court in *Stoll v. Gottlieb,* 305 U.S. 165, *reh'g denied,* 305 U.S. 675 (1938), and with numerous other circuit and lower court decisions which the Third Circuit cited and relied upon in rendering its decision. *See County Fuel Oil Co. v. Equitable Bank Corp.,* 832 F.2d 290 (4th Cir. 1987); *In re Galerie des Monnaies of Geneva, Ltd.,* 55 B.R. 253 (Bankr. S.D.N.Y. 1985), *aff'd,* 62 B.R. 224 (S.D.N.Y. 1986); *Monroe County Oil Co. v. Amoco Oil Co.,* 75 B.R. 158 (S.D. Ind. 1987). *See also, Republic Supply Co. v. Shoaf,* 815 F.2d 1046 (5th Cir. 1987); *In re Penn Central Transportation Co.,* 771 F.2d 762 (3d Cir. 1985), *cert. denied,* 474 U.S. 1033 (1985); *Southmark Properties v. Charles House Corp.,* 742 F.2d 862 (5th Cir. 1984)[2]; *Miller v. Meinhard Commercial Corp.,* 462 F.2d 358 (5th Cir. 1972). *See also, Katchen v. Landy,* 382 U.S. 323 (1966).

In affirming the District Court's dismissal of the debtor's

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2. The inapplicability of the *Texas Extrusion* case to the one now before the Court is highlighted by the fact that the Fifth Circuit did not even cite to its opinion in *Southmark Properties* in *Texas Extrusion*.

action on grounds of equitable estoppel, the Third Circuit relied upon *County Fuel Co. v. Equitable Bank Corp.*, 832 F.2d 290 (4th Cir. 1987), where the Fourth Circuit held that:

> County Fuel's failure to object or to assert its claim as a counterclaim to Equitable's claim in the bankruptcy proceeding, followed by Equitable's satisfaction of the principal amount of its claims upon lifting of the automatic stay, followed by County Fuel's express concession of the validity of Equitable's principal claim in the course of objecting to its further claim for attorney's fees, suffices to preclude County Fuel's later independent actions.

Id. at 293.

The Third Circuit's decision is also consistent with *In re Galerie des Monnaies of Geneva, Ltd.*, 55 B.R. 253 (Bankr. S.D.N.Y. 1985), *aff'd*, 62 B.R. 224 (S.D.N.Y. 1986). In that case, the debtor commenced an action against a bank to recover a series of allegedly preferential transfers. The preferences were not mentioned in the debtor's disclosure statement. The court, "in order to preserve the integrity of disclosure statements given the reliance that Congress, in enacting § 1125 of the Code, clearly expected creditors to give them," held that the debtor was estopped from prosecuting the preference actions on the basis of the debtor's failure to disclose its claim to creditors during its reorganization proceeding. 55 B.R. at 260.

Similarly, in *Monroe County Oil Co. v. Amoco Oil Co.*, 75 B.R. 158, 162 (S.D. Ind. 1987), the court applied the doctrine of equitable estoppel to bar claims brought by the debtor, Monroe, which were in existence during the debtor's bankruptcy proceedings but were not disclosed during those proceedings. The court held

that pursuant to 11 U.S.C. § 1125(b), a debtor must file a disclosure statement which contains "adequate information," including any litigation likely to arise in a nonbankruptcy context.[3] *Id.* Even though *Monroe* stated in its plan of reorganization that it retained "all causes of action it may have under the United States Bankruptcy Code," the court held that:

> When a debtor fails to disclose claims that it has during the bankruptcy proceedings, it is equitably estopped from bringing the claims after the approval of the plan of reorganization.

Id.

The Third Circuit's application *sub judice* of the doctrines of equitable and judicial estoppel is fully supported by the undisputed facts of this case. At no time during its extended bankruptcy proceedings did Oneida reveal to the court or UJB that it was planning to bring an action for lender liability. Oneida was therefore estopped from changing its prior position upon which UJB as its secured lender and the court relied.

Not only did Oneida fail to reveal its claims against UJB during its bankruptcy proceedings, it actually affirmatively represented that it had no such claims. The July 25, 1985 order, to which Oneida consented, specifically provided that the loan agreement and security interests were affirmed, ratified and adopted by Oneida (Resp. App. 2a). The September 30, 1985 order, to which Oneida consented, provided for the *unconditional*

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3. In fact, Oneida recognized the requirement that pending or contemplated litigation be disclosed in the disclosure statement and included Article VIII, entitled *Pending and Possible Litigation Affecting Distribution to Creditors* in its Disclosure Statement. Significantly, Article VIII does not make any mention of Oneida's alleged claims against UJB. Similarly, the Schedules of Assets also omits mention of any claim or counterclaim against UJB.

payment to UJB of $6,650,000 by Oneida (Resp. App. 14a-15a). The January 14, 1988 order and judgment established *the extent, validity and priority* of UJB's claim and provided that Oneida was indebted to UJB, as of the filing of its petition, in the sum of $7,631,322.73, together with accruing interest and allowed counsel fees on the aggregate indebtedness, subject *only* to Oneida's right to object to service fees charged by UJB (Resp. App. 18a-19a). The March 3, 1986 order, to which Oneida consented, provided that the reservation of rights provided for in the January 14, 1986 order was terminated and the order constituted a final order (Resp. App. 21a).

Applying well-established principles of claim preclusion to the undisputed historical facts of this case[4], the Third Circuit properly concluded that Oneida's "deafening silence" with respect to its alleged claim against UJB (Petitioner Oneida's Appendix 9, hereinafter "Pet. App."), "violated both its statutory and fiduciary duty to disclose this current claim against the bank during the pendency of the bankruptcy case." (Pet. App. 2). As a result of this failure to disclose, the doctrines of equitable and judicial estoppel were properly and necessarily invoked by the Third Circuit in order to preclude further litigation on the claim by Oneida,

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4. *See* Third Circuit Opinion (Pet. App. 6, n.3) and District Court Opinion (Pet. App. 28, n.2). Both the Third Circuit and the District Court held that resolution of this case involves only the legal question of the preclusive effect of the bankruptcy court's orders on Oneida's current claim (Pet. App. 6, n.3 and 28 n.2). The Supreme Court has often held that as a court of law, it will usually deny certiorari where review of a lower court decision is sought based upon the court's analysis of the particular facts of the case. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."). This is particularly true where, as here, the findings of the District Court receive the concurrence of the Court of Appeals. *See, Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (very obvious and exceptional error must be shown). Clearly, no such obvious or exceptional error has been shown in this case.

and to preserve the finality and integrity of the Bankruptcy Court's orders (Pet. App. 8-9).

II.

THE THIRD CIRCUIT'S DECISION IS CONSONANT WITH THE BANKRUPTCY CODE'S PROVISIONS REQUIRING FULL AND COMPLETE DISCLOSURE AND THE DEBTOR'S ABSOLUTE AND UNLIMITED RIGHT TO BE HEARD.

Incredibly, an entire point of Oneida's argument is devoted to the proposition that Oneida's failure to disclose its alleged claim against UJB is somehow consistent with the Bankruptcy Code's policy of full and candid disclosure (Pet. 19-24). To state this argument is to refute it.

The debtor's duty to file a disclosure statement which provides full and candid disclosure has been described as the "pivotal concept" in reorganization procedure under the Bankruptcy Code. 5 *Collier on Bankruptcy* ¶ 1125.03 (15th Ed. 1988); *see* 11 U.S.C. § 1125(a). Under 11 U.S.C. § 1125(a), the disclosure statement must contain "adequate information" which is statutorily defined as:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor . . . that would enable a hypothetical investor typical of holders of claims or interests of a relevant class to make an informed judgment about the plan . . . .

11 U.S.C. § 1125(a)(1988).

Clearly, the information concerning Oneida's alleged claim

against UJB would have been extremely relevant and material to UJB's decisions to: (a) allow Oneida to use $1.5 million of UJB's cash collateral; (b) refrain from interposing any objection to Oneida's Plan of Reorganization, based on 11 U.S.C. § 1129(b). *See Norwest Bank Worthington v. Ahlers,* 485 U.S. ____, 108 S. Ct. 963, 99 L. Ed. 2d 169 (1988); and (c) withdraw its motion for appointment of a trustee and for conversion or dismissal of Oneida's bankruptcy case.

Under these circumstances, Oneida had an absolute duty to disclose its potential claims against UJB. *See* 11 U.S.C. § 1125(a); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 871 (5th Cir. 1984); *Monroe County Oil Co. v. Amoco Oil Co.*, 75 B.R. 158, 162 (S.D. Ind. 1987); *In re Galerie des Monnaies of Geneva, Ltd.*, 55 B.R. 253, 259 (Bankr. S.D.N.Y. 1985), *aff'd*, 62 B.R. 224 (S.D.N.Y. 1986).

Oneida's unlimited right to be heard in its bankruptcy proceedings, combined with the obligations of full and candid disclosure set forth in the Bankruptcy Code, 11 U.S.C. §§ 521 and 1125 (1988), clearly imposed a duty on Oneida to raise its claims against UJB during the bankruptcy proceedings. Instead, Oneida chose not to assert its claim at any time during its bankruptcy proceedings or extended settlement negotiations with UJB and used over $1 million of UJB's cash collateral on the basis of those settlements. Oneida cannot now undo that which it has freely chosen to do, nor can it now restore UJB and the Bankruptcy Court to the *status quo ante*.[5] *See Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1555 (11th Cir. 1988); *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir.

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5. Based upon the Stipulation of Settlement entered on September 30, 1985, UJB released its liens and security interests in numerous motor vehicles owned by the debtor which were then sold to a third party pursuant to a Bankruptcy Court order. *See County Fuel Oil Co. v. Equitable Bank Corp., supra.*

1986); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981) (where no stay of a confirmation order is obtained, the mootness doctrine requires dismissal of an appeal which would allow a "piecemeal dismantling" of the reorganization plan and "knock the props out from the authorization of every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court.").

Oneida's argument that the Third Circuit's holding contravenes the purpose of the Bankruptcy Code is totally without merit. In fact, just the opposite is true as this case provides an illustration of how the Code's policies of rehabilitation of debtors and full disclosure would be completely frustrated if debtors were permitted to conceal potential claims against a creditor with whom the debtor was seeking a negotiated settlement. At the onset of Oneida's case, Oneida and UJB consented to an arrangement for the use of $1.5 million of UJB's cash collateral which included the acknowledgement by Oneida of the validity and extent of UJB's lien for over $7,600,000. It would be a contradiction of the expectation of the Bankruptcy Court and the lender to have the adequate protection order evaporate after the cash collateral was spent, and permit the debtor to then claim that the lender's refusal to advance funds before bankruptcy gave rise to a cause of action not merged in the order establishing the liens of UJB and providing adequate protection for such liens. Instead of providing adequate protection for the lender's benefit, such an order would reward a debtor for remaining silent and permit the debtor to subsequently ambush the creditor after having received the benefits bargained for. This result would prevent consensual agreements during the outset of a reorganization case and would frustrate the congressional policy toward rehabilitation of distressed debtors. *See In re Penn Central Transportation Co.*, 771 F.2d 762 (3d Cir.), *cert. denied*, 474 U.S. 1033 (1985).

It would be outrageously unjust to permit Oneida, which

induced UJB to forego its right to object to the use of over one million dollars of cash collateral, and to withdraw its motion for appointment of a trustee and for the conversion or dismissal of the bankruptcy case, to subject UJB to belated claims, as though the settlements were never made, and as though the bankruptcy court's orders were written in invisible ink. Such a result would make a mockery of the finality and integrity of bankruptcy court orders and eliminate the value of any judgment of that court, except after a complete trial. Thus, the Third Circuit's decision is completely consistent with the fundamental purposes of the Bankruptcy Code — the rehabilitation of debtors through full and candid disclosure to creditors upon which negotiated reorganization transactions may occur.[6]

No important federal question is presented by Oneida's petition since it was clearly not Congress' intention that the adequate information requirement of § 1125 would allow a debtor to provide anything less than full and candid disclosure to its creditors. The absence of such an important federal question further supports denial of Oneida's petition for certiorari. *Cf.*, *American Federation of Musicians v. Wittestein*, 379 U.S. 171, 175 (1964).

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6. It is to be noted that paragraph 10 of the July 25, 1985 consent order provides that: "The security interests and liens granted to United Jersey Bank hereunder and the obligations shall not be altered, modified, extended, impaired or affected by any Plan of Reorganization or by an Order of the Court unless consented to by United Jersey Bank in writing." (Resp. App. 7a).

III.

CERTIORARI IS NOT APPROPRIATE TO REVIEW A PRIVATE DISPUTE BETWEEN A CHAPTER 11 DEBTOR WHICH BREACHED BOTH ITS STATUTORY AND FIDUCIARY DUTIES TO THE COURT AND ITS CREDITORS.

The Third Circuit invoked principles of equitable and judicial estoppel against Oneida based upon an express finding that Oneida breached both its statutory and fiduciary duties to the court and its creditors by failing to disclose its alleged claims against UJB (Pet. App. 2). In this regard, the court stated that " 'the silence' in the Oneida bankruptcy record concerning this present claim . . . 'is deafening.' " (Pet. App. 9).

Since it is to be expected that other Chapter 11 debtors will comply with their express statutory and fiduciary duties in their own bankruptcy cases, certiorari is not appropriate in this case because Oneida's petition does not present any issues of importance to the public as contrasted with issues of importance to the individual parties involved in this action. *See Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79 (1955).

CONCLUSION

In sum, this case involves the application of well-settled principles of claim preclusion and equitable and judicial estoppel to an undisputed record of historical facts (Pet. App. 6, n.3 and 28, n.2). Further, the Third Circuit's decision is completely consistent with the decisions of this Court and other circuit and district courts. Oneida's petition for certiorari is a thinly disguised attempt to obtain another hearing on the very same arguments which were rejected by the Third Circuit and the District Court.

Dissatisfaction with the decisions of lower courts does not provide sufficient reason for the allowance of a writ of certiorari. *See Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923) ("The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."). Therefore, Oneida's petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM S. KATCHEN
Counsel of Record
CLAPP & EISENBERG
A Professional Corporation
Attorneys for Respondent
80 Park Plaza
Newark, New Jersey 07102
(201) 642-3900

Dated: November 1, 1988

WILLIAM S. KATCHEN
Of Counsel

WILLIAM S. KATCHEN
JOHN L. LASKEY
VINCENT F. PAPALIA
On the Brief

APPENDIX A — ORDER DATED JULY 25, 1985

WOLFF & SAMSON
A Professional Corporation
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 740-0500
Attorneys for United Jersey Bank

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

Bankruptcy No. 85-03606(DV)

In the Matter of:

ONEIDA MOTOR FREIGHT, INC.,

Debtor.

ORDER AUTHORIZING USE OF CASH COLLATERAL, GRANTING SENIOR LIENS PRIORITY ADMINISTRATIVE EXPENSE, AND OTHER RELIEF

This matter having been opened to the Court upon the application of the Debtor and Debtor-In-Possession for authority to use cash collateral pursuant to 11 U.S.C. Section 363, and a hearing, upon short notice pursuant to Court Order, having been held on July 11, 1985; Richard B. Honig, Esq. and David Nicolette, Esq. on behalf of the Debtor; William Katchen, Esq., Robert Nies, Esq., and Robert Mulligan, Esq. on behalf of United Jersey Bank; Robert Baime, Esq. on behalf of Turnpike Ford and Teamsters Local 707 and Novalyn L. Winfield, Esq. on behalf of the U.S. Trustee, and the Court having taken oral testimony on behalf of the Debtor and United Jersey Bank, and having

considered the legal arguments and objections, and good and sufficient cause appearing for the granting of the relief herein:

IT IS on this 25th day of July, 1985, ORDERED:

1. Pending further Order of this Court, the Debtor- In-Possession shall be authorized to use cash collateral, subject to the terms of paragraph 7 herein, to the extent of $750,000.00 (which amount includes $450,000.00 presently held by the debtor) for payment of pre-petition priority wages and payroll taxes and post-petition accrued payroll and payroll taxes; plus any additional amounts, up to $750,000 of cash collateral, subject to the terms of paragraph 7 herein, which shall be: (i) scheduled for disbursement a week in advance, upon notice to United Jersey Bank; (ii) subject to objection by United Jersey Bank and request for a Court hearing upon five (5) days notice; and (iii) not used by the Debtor-In-Possession pending final Court approval;

2. The pre-petition loan documents entered between United Jersey Bank and the Debtor, copies of which are annexed to United Jersey Bank's application for relief from the automatic stay, and all other loan docunentation between United Jersey Bank and the Debtor, together with the security interests created thereunder, be and hereby are affirmed, ratified and adopted by the Debtor and Debtor-In-Possession;

3. That the use and consumption by the Debtor and Debtor-In-Possession of the cash collateral subject to United Jersey Bank's liens, shall constitute a super priority administration expense claim, pursuant to section 507 (b) of the Bankruptcy Code, in favor of United Jersey Bank, senior to any and all claims against the Debtor and Debtor-In-Possession under 507 (a) of the Bankruptcy Code, whether in this proceeding or in any superseding proceeding,

including claims for professional fees and any other charges;

4. That all such obligations of the Debtor and Debtor-In-Possession shall be payable on demand in the event of a material breach or default in the terms of this Order;

5. That to secure repayment of any and all loans, advances or other amounts due and owing by the Debtor and Debtor-In-Possession to United Jersey Bank resulting from the use or consumption of cash collateral, and as an express condition for the use or consumption of cash collateral, to the extent provided as a replacement lien under sections 361 and 363 (e) of the Bankruptcy Code, the Debtor and Debtor-In-Possession, collectively, are authorized and, by this Order do hereby grant, convey and assign to United Jersey Bank a continuing first lien and security interest in all unencumbered property of the Debtor and Debtor-In-Possession, whether now existing or hereafter created, including but not limited to (i) all motor vehicles, trucks, tractors and trailers; (ii) five (5) terminal buildings and real estate owned by the Debtor at: 127 East Broad Street, Frankfort, New York; 477 Montgomery Street, Chicopee, Mass.; Rt. 22 B-Main Street, Morrisonville, New York; Terminal Road, Poughkeepsie, New York; Thompson Road, Dewitt, New York; (iii) one (1) additional terminal building and real estate at Main Street, Wells River, Vermont subject only to a valid, existing first mortgage, and (iv) all proceeds of the foregoing (i)-(iii), all of which property ("additional collateral") shall collectively cross-collateralize the obligations due and to become due from the Debtor and Debtor-In-Possession to United Jersey Bank resulting from (i) the use or consumption of cash collateral by the Debtor-In-Possession or (ii) from any injury, loss or decrease in value sustained by United Jersey Bank resulting from the Debtor and Debtor-In-Possession's use, sale or leasing of pre-petition collateral subject

to United Jersey Bank's pre-petition liens, as provided in section 361(2);

6. That United Jersey Bank be and hereby is granted relief from the stay provisions of section 362 (a) of the Bankruptcy Code to liquidate its pre-petition collateral and additional collateral created herein, provided: (i) pre-petition motor vehicle collateral shall not be sold for 60 days from July 25, 1985 unless consented to in writing by the Debtor and United Jersey Bank and following notice and hearing as required by sections 363 or 102 of the Bankruptcy Code, or as ordered; (ii) thereafter, United Jersey Bank is hereby authorized to sell the motor vehicle collateral, following notice and hearing, as required by sections 363 or 102 of the Bankruptcy Code, or as ordered, and to apply the proceeds of sale to satisfy United Jersey Bank's pre-petition debt of $7,631,322.73 consisting of $5,891,897.74 principal; $107,174.99 interest to July 9, 1985, and letters of credit of $1,632,250, to the extent paid, together with accruing interest and allowed counsel fees on the aggregate indebtedness; (iii) adequate protection collateral created herein shall not be sold without the Debtor's consent prior to 180 days from July 25, 1985 and following notice and hearing as required by sections 363 or 102 of the Bankruptcy Code, or as ordered; (iv) thereafter United Jersey Bank is hereby authorized to sell the adequate protection collateral, following notice and a hearing, as required by sections 363 or 102 of the Bankruptcy Code, or as ordered, and to apply the proceeds of sale to satisfy United Jersey Bank's pre-petition debt of $7,631,322.73 consisting of $5,891,897.74 principal; $107,174.99 interest to July 9, 1985, and letters of credit of $1,632,250, to the extent paid, together with accruing interest and allowed counsel fees on the aggregate indebtedness, and to satisfy the allowed super-priority claim of United Jersey Bank under section 507 (b) of the Bankruptcy Code arising from the Debtor-In-Possession's

use, sale or leasing of collateral; (v) the Debtor and Debtor-In-Possession shall be obligated to United Jersey Bank to the full extent of the letters of credit issued by United Jersey Bank and shall, at all times after liquidation of United Jersey Bank's pre-petition collateral, hold in escrow with United Jersey Bank, sufficient funds, other than funds realized from sale of pre-petition collateral, to satisfy the dollar amount of such letters of credit issued prior to termination thereof. Upon liquidation of such letters of credit United Jersey Bank is authorized to apply such escrowed funds to satisfy such claims arising from the payment of said letters of credit.

7. That the Debtor-In-Possession shall: (i) forward weekly reports to United Jersey Bank and the U.S. Trustee setting forth all monies received in payment of accounts receivable, and setting forth all disbursements, together with any documentation in support thereof; (ii) maintain all Debtor-In-Possession operating accounts with United Jersey Bank and remit to United Jersey Bank and deposit therein all receipts from collection of accounts receivable, both pre-petition and post-petition; (iii) provide United Jersey Bank with five (5) days prior notice of any weekly expenditures over $10,000.00 in total so that United Jersey Bank may object and request a court hearing, in its discretion, for any such expenditures; (iv) on or before July 19, 1985 provide hazard, loss and fire insurance on all collateral now existing or hereafter acquired, including proceeds, pursuant to this Order, in an amount equal to the indebtedness set forth in paragraph 6, with United Jersey Bank designated as loss payee, to the extent of its interest therein; (v) pay outstanding real estate taxes due and to become due on property listed in paragraphs 5 (ii) and (iii), and authorize United Jersey Bank to pay such taxes; to redeem any tax lien certificates thereon, and to advance necessary premiums for insurance coverage in paragraph (iv) herein, and to add said

amounts to the Debtor's and DebtorIn-Possession's obligations secured by the Bank's liens herein; (vi) employ, subject to further Court Order, watchmen, or other security personnel, in sufficient number to adequately protect and preserve the collateral now existing or hereafter acquired pursuant to this Order,and authorize United Jersey Bank, in its discretion and subject to further Court Order, to employ watchmen, or other security personnel, in sufficient number to adequately protect and preserve the collateral now existing or hereafter acquired pursuant to this Order, and to add said costs of preservation in the amount of the bank's indebtedness as set forth in paragraph 6 herein, and secured by the granting of post-petition security interest, pursuant to this Order;

8. That without the necessity of filing financing statements, mortgages or other documents, this Order shall be sufficient evidence of United Jersey Bank's perfected liens and security interests in and to the Debtor and Debtor-In-Possession's property as described herein and the Debtor-In-Possession is hereby authorized and directed to execute and to perform all acts to make, execute and deliver all instruments as may be necessary or appropriate to implement the terms and conditions of this Order and the transactions described herein, including but not limited to Uniform Commercial Code financing statements, mortgages and motor vehicle titles, and to pay such costs and expenses as may be reasonably required to evidence perfection of United Jersey Bank's security interests, as created herein. This Order may be filed and recorded by United Jersey Bank to protect the interests created herein, in lieu of filing of the Debtor's petition, with the same effect as if said petition had been filed and recorded, as authorized under section 549 of the Bankruptcy Code;

9. That the property securing United Jersey Bank's claims

shall not be subject to any claim or charge of the Debtor, Debtor-In-Possession, Creditors Committee, any Trustee or other fiduciary appointed or elected, any professional employed or retained by any of the aforementioned, or any costs, commissions or expenses, of whatever nature. All obligations of the Debtor and Debtor-In-Possession to United Jersey Bank now in existence or hereafter incurred shall have priority over all administrative expenses of the kind specified in 11 U.S.C. sections 503(b), 506(c) or 507;

10. That there shall not at any time be entered in this Chapter 11 proceeding or any subsequent Chapter 7 proceeding any further Order which authorizes (a) the use of cash collateral of the Debtor or the sale, lease or other disposition of property of the estate of the Debtor in which United Jersey Bank has an interest or (b) under 11 U.S.C. Section 364 of the obtaining of credit or the incurring of indebtedness secured by a lien or security interest which is equal or senior to a lien or security interest held by United Jersey Bank or which is entitled to priority administrative status which is equal or superior to that granted to United Jersey Bank; unless (i) United Jersey Bank shall have given its prior written consent thereto, or (ii) such other Order requires that there shall first be indefeasibly paid in full to United Jersey Bank all debts and obligations of Debtor and Debtor-In-Possession which either now exist or arise or result from any of the obligations, loans, credit, security interests and liens described and authorized herein. The security interests and liens granted to United Jersey Bank hereunder and the obligations shall not be altered, modified, extended, impaired or affected by any Plan of Reorganization, or by any Order of the Court unless consented to by United Jersey Bank in writing;

11. That entry of this Order shall be without prejudice to the rights and remedies of a trustee or the official creditors

committee to timely seek review or assert defenses to the extent, validity and priority of the pre-petition security interest or claims of United Jersey Bank, validated herein;

12. That in the event United Jersey Bank assigns its rights against the Debtor to a third party, such third party shall have all the rights, benefits and remedies of United Jersey Bank hereunder;

13. That United Jersey Bank shall have the right upon telephone notice to the Debtor, at any time during the Debtor's normal business hours, to inspect, audit, examine, check, make copies of or extracts from records of the Debtor or any collateral, and the Debtor shall make all of its records and the collateral available to United Jersey Bank for such purposes;

14. That nothing contained herein shall be construed to obligate United Jersey Bank to make any loans or advances to the Debtor or Debtor-In-Possession;

15. That the Debtor and Debtor-In-Possession acknowledge and consent to the extent, validity and priority of the pre-petition liens and security interests of United Jersey Bank, for the indebtedness set forth in paragraph 6 herein, in all accounts receivable; presently existing or hereafter arising or acquired; motor vehicles, trucks, tractors and trailers as more particularly described in the security agreements and certificates of title, all of which are incorporated herein by reference; notes, instruments, chattel paper or contract rights now existing or hereafter arising; goods and merchandise now existing or hereafter arising; all goods, instruments, documents of title, policies and certificates of insurance, securities, chattel paper, deposits or other property owned by the Debtor or in which it has an interest which are now or may hereafter be in the possession or control of United Jersey Bank, and all proceeds and products of the aforementioned collateral;

Appendix A

16. That United Jersey Bank and its employees, agents or representatives be and hereby are authorized to execute and file all financing statements, or other documentation, necessary to continue and perfect the liens and security interests granted pursuant to this Order, with the same force and effect as though executed by the Debtor and Debtor-In-Possession;

17. Notwithstanding paragraphs 6 and 10 herein, Debtor-In-Possession may advise, on not less than 5 days written notice to United Jersey Bank and its counsel (Wolff & Samson, P.A. and Robert Mulligan, Esq.) of its intention to accept any *bona fide* offer for the use, sale or lease of any of the collateral subject to the liens of United Jersey Bank, with such proceeds paid to United Jersey Bank against the foregoing indebtedness provided herein, upon consummation of any such use, sale or lease of collateral, subject to the liens of United Jersey Bank, authorized by final Court Order;

18. Notwithstanding any provisions herein, the obligations of the Debtor and Debtor-In-Possession shall become immediately due and payable to United Jersey Bank and United Jersey Bank's consent to the use, sale or lease of collateral by Debtor and Debtor-In-Possession shall be immediately revoked without further court order in the event of the earlier of: (i) entry of an order converting the within proceedings from Chapter 11 to Chapter 7 of the Bankruptcy Code; (ii) entry of an Order authorizing the appointment of a Trustee or Examiner; (iii) entry of an Order modifying or vacating the section 362(a) stay in favor of any other secured party with respect to collateral, subject to the liens of United Jersey Bank; or (iv) entry of an Order confirming a Plan of Reorganization by the Debtor-In-Possession or any other party.

Appendix A

s/ Rosemary Gambardella
Honorable Rosemary Gambardella
United States Bankruptcy Judge

The undersigned consents
to the form and entry of
the within Order:

By: s/ Richard B. Honig
Richard B. Honig,
Attorney for the Debtor
and Debtor-In-Possession

APPENDIX B — CONSENT ORDER DATED SEPTEMBER 19, 1985

KLINGER, NICOLETTE, MAVROUDIS
& HONIG
A Professional Corporation
25 East Salem Street
P.0. Box 566
Hackensack, New Jersey 07602
(201) 488-5000
Attorneys for Debtor/Debtor
in Possession

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Case No. 85-03606 DV
Chapter 11 Proceeding

In the Matter of:

ONEIDA MOTOR FREIGHT, INC.,

Debtor.

CONSENT ORDER MODIFYING CASH COLLATERAL ORDER

THIS MATTER, being opened to the Court by Klinger, Nicolette, Mavroudis & Honig, P.C., attorneys for Oneida Motor Freight, Inc., Debtor/Debtor In Possession, with the consent of Wolff & Samson, P.C., attorneys for secured party, United Jersey Bank; and Booth, Marcus & Pierce, Esqs., attorneys for the Official Creditors Committee; and it appearing to the Court from the annexed Application that the parties have agreed to a

modification of the Cash Collateral Order entered by the Court on July 25, 1985, as more specifically set forth below; and other good and sufficient cause being shown for the making and entry of the within Order;

IT IS on this 19th day of September, 1985,

ORDERED that the Cash Collateral Order entered by the Court on July 25, 1985, be and is hereby modified as follows:

1. Paragraphs 1 and 7 of the Cash Collateral Order authorizing the Debtor In Possession to pay weekly administration expenses up to $10,000 and to pay weekly payroll and administration expenses in excess of $10,000 only upon notice to United Jersey Bank is modified to provide that the Debtor In Possession shall have the authority, without prior notice to the bank or Creditors Committee, to use cash collateral up to the sum of $150,000 now on deposit with United Jersey Bank for payroll, utility service, insurance, taxes, and other miscellaneous Debtor In Possession obligations, exclusive of obligations for use and occupancy for the Debtor's terminals or any payments to insiders of the Debtor.

2. All other provisions of the Cash Collateral Order shall remain in full force and effect including but not limited to the provisions for adequate protection in favor of United Jersey Bank.

s/ Rosemary Gambardella
BANKRUPTCY JUDGE

Appendix B

We hereby consent to the
form and entry of the
within Order.

WOLFF & SAMSON, P.C.
Attorneys for United Jersey Bank

By: s/ William S. Katchen

BOOTH, MARCUS & PIERCE, ESQS.
Attorneys for the Official Creditors Committee

By: s/ David A. Gzesh

KLINGER, NICOLETTE, MAVROUDIS
& HONIG, P.C.
Attorneys for Oneida Motor Freight, Inc.,
Debtor/Debtor In Possession

By: s/ Richard B. Honig
RICHARD B. HONIG, ESQ.

APPENDIX C — STIPULATION AND ORDER DATED SEPTEMBER 30, 1985

WOLFF & SAMSON
A Professional Corporation
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 740-0500
Attorneys for United Jersey Bank

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

Bankruptcy No. 85-03606

In Re:

ONEIDA MOTOR FREIGHT, INC.,

Debtor.

STIPULATION AND ORDER CONFIRMING SETTLEMENT AMONG UNITED JERSEY BANK, ONEIDA MOTOR FREIGHT, INC., DEBTOR AND DEBTOR-IN-POSSESSION, AND THE OFFICIAL UNSECURED CREDITORS COMMITTEE

It is hereby stipulated by and among the above parties as follows:

1. That the Order of this Court entered on July 25, 1985 a copy of which is hereto annexed as Exhibit A, shall be modified and the parties hereto bound by such modification with respect to the time for payment by the Debtor and Debtor-In-Possession of the sum of $4,650,000 to United Jersey Bank on or before

Appendix C

October 3, 1985, in addition to the unconditional payment to United Jersey Bank by the Debtor-In-Possession of the sum of $2,000,000, such payments to be made on or before October 3, 1985 in cashiers, certified or bank funds to be applied to the outstanding security interest of United Jersey Bank against all accounts receivable of the Debtor; certain motor vehicles and equipment of the Debtor, as set forth in separate judgment establishing validity of security interest of United Jersey Bank in motor vehicles and other collateral and in satisfaction of the post-petition senior lien and security interest granted as adequate protection to United Jersey Bank, pursuant to this Court's Order of July 25, 1985.

2. United Jersey Bank shall be paid, with respect to its claim for deficiency, after applying the proceeds of cash collateral account in the approximate amount of $800,000 to any finally determined liability as issuer of letters of credit for the account of the Debtor, a dividend of thirty percent (payable fifteen percent in cash at the time of confirmation and an additional fifteen percent within six months from the date of confirmation) upon the same terms and conditions as the Plan of Reorganization to be filed by the Debtors and as recommended by counsel to the Official Creditors Committee.

3. In the event that the allowed claims of all general unsecured creditors of the Debtor, excluding the deficiency claims of United Jersey Bank under letters of credit referred to in the preceding paragraph hereof, are less than $9,000,000, United Jersey Bank shall be allowed to participate in a dividend payable by the Debtor of thirty percent for such amount of the deficiency claim provided such deficiency shall not, when added to all other allowed unsecured claims, exceed $9,000,000 of allowed claims. In the event that the allowed unsecured claims of all unsecured creditors

of the Debtor, without United Jersey Bank's deficiency claim aforesaid, shall equal or exceed $9,000,000, in such case the deficiency claim of United Jersey Bank, with respect to letters of credit, shall be paid the dividend of thirty percent from funds provided by insiders or affiliates of the Debtor, in order to provide a thirty percent dividend on such claim, such dividend not to exceed the amount of cash collateral used by the Debtor-In-Possession since September 19, 1985.

4. As an express condition of this Stipulation, that the entire sum of $4,650,000 be paid to United Jersey Bank on or before October 3, 1985 in addition to the $2,000,000 of proceeds of accounts receivable heretofore applied to the outstanding debt.

5. Upon unconditional payment of the above amount to United Jersey Bank on or before October 3, 1985, United Jersey Bank shall deliver to the Debtor-In-Possession, or its assigns, or any purchaser under a sales transaction approved by an Order of this Court, all liens and security interests marked satisfied with respect to the motor vehicles and accounts receivable which secured the Debtor's pre-petition and post-petition obligations to United Jersey Bank.

6. In the event of any breach of this Stipulation, including any stay against delivery of the proceeds of sale, whether or not beyond the control of the Debtor or Debtor-In-Possession, any stay against the enforcement by United Jersey Bank of its pre-petition liens and security interests against motor vehicles and accounts receivable collateral of the Debtor shall be vacated, annulled, and terminated *nunc pro tunc* to September 19, 1985.

Appendix C

WOLFF & SAMSON
Attorneys for United Jersey Bank

By: s/ William S. Katchen
WILLIAM S. KATCHEN

KLINGER, NICOLETTE, MAVROUDIS
& HONIG
Attorneys for Debtor

By: s/ Richard B. Honig
RICHARD B. HONIG

BOOTH, MARCUS & PIERCE
Attorneys for the Official Creditors Committee

By: s/ Leon C. Marcus
LEON C. MARCUS

IT IS SO ORDERED on this 30th day of September, 1985.

s/ Rosemary Gambardella
ROSEMARY GAMBARDELLA,
U.S.B.J.

APPENDIX D — ORDER AND JUDGMENT DATED JANUARY 14, 1986

WOLFF & SAMSON
A Professional Corporation
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 740-0500
Attorneys for United Jersey Bank

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

Bankruptcy No. 85-03606DV

In Re:

ONEIDA MOTOR FREIGHT, INC.,

Debtor.

ORDER AND JUDGMENT ESTABLISHING EXTENT AND VALIDITY OF LIEN OF UNITED JERSEY BANK

This matter having been brought before the Court upon filing of a Motion by Wolff & Samson, P.A., attorneys for United Jersey Bank, seeking relief from the automatic stay provisions of section 362 of the Bankruptcy Code; to enforce security interests; to appoint Trustee and in the alternative for conversion or dismissal of the Chapter 11 case, and good and sufficient cause appearing for the making of the within Order,

IT IS on this 14th day of January, 1986

1) That there is due and owing by the Debtor to United Jersey Bank, as of the filing of Debtor's petition, $7,631,322.73 consisting

of $5,891,897.74 principal; $107,174.99 interest to July 9, 1985 and letters of credit of $1,632,250.00, to the extent paid, together with accruing interest and allowed counsel fees on the aggregate indebtedness, secured by a valid lien and first, priority security interest, under Article 9 of the Uniform Commercial Code, in all of the Debtor's accounts receivable, then existing or thereafter created; notes, instruments or chattel paper; general intangibles then owned or thereafter acquired; goods, documents of title; certificates; deposits; certain motor vehicles, tractors and trailers, and proceeds as more particularly described in the loan and security documents annexed hereto as Exhibit A to J, inclusive.

Entry of this Order is without prejudice to the Debtor's right to an accounting for service charges charged against the Debtor's account by the Bank and to apply to the Court for return of said charges if the Debtor ultimately objects to same.

s/ D. Joseph DeVito
D. JOSEPH DeVITO,
U.S.B.J.

APPENDIX E — ORDER DATED MARCH 3, 1986

KIMMELMAN, WOLFF & SAMSON
A Professional Corporation
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 740-0500
Attorneys for United Jersey Bank

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

Bankruptcy No. 85-03606DV

In the Matter of

ONEIDA MOTOR FREIGHT, INC.,

Debtor.

ORDER SUPPLEMENTING ORDER AND JUDGMENT ESTABLISHING EXTENT AND VALIDITY OF LIEN OF UNITED JERSEY BANK

This matter being opened to the Court by Kimmelman, Wolff & Samson, P.A., attorneys for United Jersey Bank, upon consent to the form and entry hereof by Klinger, Nicolette, Mavroudis & Honig, attorneys for Debtor and Debtor-In-Possession, and due cause appearing

IT IS on this 3rd day of March, 1986

ORDERED that the Order and Judgment Establishing Extent and Validity of Lien of United Jersey Bank entered by this Court on January 14, 1986 (Exhibit A annexed hereto) be and hereby is supplemented as follows:

Appendix E

1. That the reservation of any rights as contained in the annexed Order by the Debtor/Debtor In Possession pertaining to service fees charged to the Debtor's account by United Jersey Bank and the reservation of any claim for an accounting with respect to said service fees be and are hereby terminated upon the payment by United Jersey Bank to the Debtor In Possession the sum of $12,164.09, which sum shall be paid within ten (10) days of the date of this Order.

2. That the reservation of jurisdiction, as contained in the Order and Judgment of January 14, 1986, be and hereby is terminated upon the entry hereof.

3. That the entry of this Supplemental Order shall constitute a Final Judgment for purposes of Rule 9021 and 8001, *et seq.* of the Rules of Bankruptcy Procedure.

s/ D. JOSEPH DeVITO
D. JOSEPH DeVITO
Bankruptcy Judge

The undersigned hereby consents
to the form and entry of the within Order.

KLINGER, NICOLETTE, MAVROUDIS
& HONIG
A Professional Corporation
Attorneys for Oneida Motor Freight, Inc.
Debtor/Debtor In Possession

By: s/ RICHARD B. HONIG
RICHARD B. HONIG
A Member of the Firm

APPENDIX F — ORDER DATED AUGUST 14, 1986

KLINGER, NICOLETTE, MAVROUDIS
& HONIG
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Attorneys for Debtor

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(212) 620-0300
Attorneys for Creditors Committee

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Case No. 85-03606 DV
Chapter 11 Proceeding

In the Matter of:

ONEIDA MOTOR FREIGHT, INC.,

Debtor.

ORDER CONFIRMING AMENDED JOINT PLAN OF REORGANIZATION

THIS MATTER, having come on before the Court on August 14, 1986, to consider the application for confirmation of the Amended Joint Plan of Reorganization ("Plan") proposed by

the Debtor and Official Creditors Committee ("Committee"), which was filed on May 23, 1986, and it appearing that copies of the Plan and the Amended Disclosure Statement approved by this Court having been submitted to the holders of claims and interest and due notice having been given of the hearing, and the Court having made and entered its "Findings of Fact and Conclusions of Law Regarding Confirmation of the Amended Joint Plan of Reorganization", after hearing on sufficient notice;

IT IS on this 14th day of August, 1986,

ORDERED, ADJUDGED AND DECREED THAT:

1. The Amended Joint Plan of Reorganization filed by the Debtor and Official Creditors Committee herein on May 23, 1986, a copy of which is attached hereto and expressly made a part hereof, is hereby confirmed. The Debtor and Committee are authorized and directed to take all actions necessary to effectuate and consummate the Plan.

2. Pursuant to Section 1.18 of the Plan, the Effective Date* of the Plan shall be the first business day following the date on which this Confirmation Order becomes a Final Order.

3. Debtor shall continue to operate its business as Debtor In Possession, and Debtor's estate created in this Chapter 11 case shall continue in existence after confirmation of the Plan until the Effective Date, at which time the assets of the Estate, tangible and intangible, shall vest in Debtor free and clear of any and all claims, liens and encumbrances. Post-confirmation costs and expenses incurred before the Effective Date by Debtor in

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* Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Plan.

connection with the operation of its business, administration of the Estate and implementation of the Plan shall be treated as first priority administrative expenses under the Plan.

4. The Official Unsecured Creditors' Committee of Oneida Motor Freight, Inc. ("Committee") will continue in its current form after confirmation of the Plan and until the Effective Date. After the Effective Date, to the extent necessary, appropriate and required under the Plan, the Committee shall continue in existence in accordance with Article X of the Plan.

5. The law firms of Klinger, Nicolette, Mavroudis & Honig, P.C., counsel for the Debtor, and Booth, Marcus & Pierce, Esqs., counsel for the Committee, are hereby designated to serve as Joint Disbursing Agents under the Plan, subject to the provisions of Rule 11-5 and 6 of the Local Rules of Bankruptcy Procedure, and said Disbursing Agents shall receive and retain possession and control of all funds necessary to distribute pursuant to the provisions of the Plan itself and the entry of subsequent Orders by this Court.

6. The delivery by the Debtor and Singleton to the Disbursing Agents of property to be distributed pursuant to the Plan shall discharge the Debtor and Singleton of any further liability or obligation with respect to the distribution of such property, except with respect to unclaimed distributions returned to Debtor.

7. All distributions under the Plan shall be made by the Disbursing Agents in accordance with Article XI of the Plan. Any and all property held by the Debtor or the Disbursing Agents that is to be distributed pursuant to the Plan shall be held in trust for holders of claims entitled thereto and shall be segregated from other property held by such persons or entities.

Appendix F

8. Pursuant to the provisions of the Plan, the Debtor and Singleton shall deposit, or cause to be deposited, with the Disbursing Agents on or before the first Distribution Date all sums sufficient to meet all of the cash obligations provided for under the Plan upon the Effective Date.

9. The Disbursing Agents shall keep true and accurate records and account for all receipts (including investment income) and disbursements. All property held by the Disbursing Agents shall be invested in accordance with Section 345 of the Bankruptcy Code, and the Disbursing Agents shall have all of the obligations imposed upon a Trustee pursuant to that section. The Disbursing Agents shall separately account for invested property. Such accounting shall reflect the current market value of such invested property. The Disbursing Agents shall prepare such accountings, file them with the Bankruptcy Court and serve them on the Debtor and the Committee (so long as it remains in existence) within seventy-five (75) days after the First Distribution Date and quarterly thereafter. The Disbursing Agents' obligations pursuant hereto and pursuant to the Plan shall continue until all property has been distributed in accordance with the Plan.

10. Except as ordered by the Court, no interest shall accrue or become payable on any distribution provided for under the Plan.

11. On the Effective Date, the Debtor is discharged from any debt that arose prior to the date hereof and any debt of the kind specified in 11 U.S.C. Section 502(g), (h) or (i), whether or not a proof of claim was filed or deemed filed, whether or not such claim accepted the Plan and whether or not the right to payment was reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed,

legal, secured, or unsecured.

12. Any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the Debtor with respect to any debt discharged, is void.

13. Except as provided herein, the commencement or continuation of any action, the employment of process or any act to collect, recover or offset any such debt as a personal liability of the Debtor, or from property of the Debtor, is enjoined. The provisions of Section 362 of the Bankruptcy Code shall remain in full force and effect until the Effective Date.

14. Pursuant to Article IX of the Plan, all executory contracts, except those which are not specifically adopted at or before the entry of this Confirmation Order or are not the subject of a pending application to affirm and adopt, shall be and hereby are deemed rejected. Proofs of any and all claims arising from the rejection of such executory contracts must be filed on or before thirty (30) days from the date of entry of this Order.

15. All final requests for payment of administrative expenses pursuant to 11 U.S.C. Section 507(a)(1), including, without limitation, all applications for compensation of professional persons for services rendered prior to the Effective Date of the Plan, including applications of entities entitled to payment under 11 U.S.C. Section 503(b), must be filed and served on the Debtor, the Committee, and the United States Trustee within forty-five (45) days after the Effective Date, unless extended by the Court. Any claim of a kind specified in paragraphs 14 and 15 hereof that is not filed on or before the respective deadlines set forth therein, shall not participate in distributions under the Plan and shall be forever barred; and Debtor, the Estate, and the Disbursing

Appendix F

Agents shall have no further obligation or liability therefor.

16. On the Effective Date, and except as otherwise provided in the Plan itself or hereunder, the property dealt with by the Plan shall be free and clear of all claims and interests of creditors and equity security holders of the Debtor.

17. The objections to confirmation not heretofore withdrawn are overruled.

18. This Court hereby retains jurisdiction as set forth in Article XIV of the Plan.

19. The Debtor and Committee hereby are authorized to file and prosecute objections to the allowance of any claims. The administrative expenses of prosecuting any such objections shall be paid out of Debtor's general funds. All Motions or objections to the validity or amount of any claim against the Debtor arising prior to the filing of the reorganization petition and/or during the course of these proceedings, shall be served and filed on or before March 2, 1987, or such other further date or dates as may be fixed by subsequent Order of the Court.

20. Copies of this Order shall be mailed by Debtor to all creditors, equity security holders, and other parties entitled to notice, along with notice of entry hereof.

21. All claims not allowed or filed prior to the date of this Order; including post-Petition claims, and not previously barred by Order of the Court, shall be barred, if not filed within thirty (30) days after the date of mailing of notice to all creditors of the entry of this Order, such last date for filing being hereby determined to be September 26, 1986.

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22. After the date this Confirmation Order becomes a Final Order, all notices required to be given under the applicable provisions of the Bankruptcy Code and/or the Bankruptcy Rules ("Notices") shall be sent by first class mail, postage prepaid, to Klinger, Nicolette, Mavroudis & Honig, P.C., attorneys for the Debtor, and simultaneously to Booth, Marcus & Pierce, Esqs., (or its successor) who is hereby designated as the duly authorized agent of and for the Creditors' Committee, with copies to be mailed: (a) to the Debtor; (b) to the United States Trustee; (c) to the United States in accordance with Bankruptcy Rules 2002(j); and (d) to Ravin, Sarasohn, Cook, Baumgarten & Fisch, Esqs., local counsel to the Creditors Committee. Service of all Notices, as provided herein, shall constitute full and complete service on all parties-in-interest.

s/ JUDITH H. WIZMUR
JUDITH H. WIZMUR,
BANKRUPTCY JUDGE